No. 86-337

In the Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
vs.
OKLAHOMA TAX COMMISSION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE STATES OF KANSAS, ARIZONA, GEORGIA, IDAHO, NEW MEXICO, MISSOURI, AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does 49 U.S.C. Section 11503 confer subject matter jurisdiction on a district court of the United States to hear allegations of *mere* overvaluation by owners of rail transportation property and to order state tax officials to use the Court's estimate of value of such property for state ad valorem tax purposes?

Statutes and Regulations:

Legislative Materials

Bills:

Hearings:

Reports:

INTEREST OF THE AMICUS CURIAE

The State of Kansas, by and through its duly elected and appointed Attorney General, Robert T. Stephan, respectfully submits this brief on behalf of the Oklahoma Tax Commission. Supreme Court Rule 36.4 permits the State of Kansas to file this brief without obtaining the consent of the parties. The following states join Kansas in this brief: Arizona, Georgia, Idaho, New Mexico, Missouri, and Utah.

The Burlington Northern Railroad (hereinafter "BN") seeks an order reversing the jurisdictional threshold requirement of "purposeful overvaluation with discriminatory intent" enunciated in *Burlington N. R.R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984) (hereinafter "Lennen"), and applied in the present case. The BN claims that 49 U.S.C. Section 11503[1] vests the federal judiciary with jurisdiction to hear complaints of mere overvaluation of rail transportation property for ad valorem tax purposes and to value that property anew. Since *Lennen* involved Kansas and its ad valorem tax system, the interests of Kansas and the states joining in this brief are in maintaining the rights of the states in exercising their powers of taxation, and in preserving the integrity of states' legislatively developed systems of taxation.

Ad valorem taxes are the primary means of financing local units of government, be they counties, municipalities or school districts. Each state has legislatively devised a system of taxation for financing its public works at all levels; these systems or schemes of taxation guarantee that all similarly situated taxpayers are treated equally. The BN seeks a rule which will permit the federal judiciary to change the foundation upon which these systems of taxation are built.

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1. 49 U.S.C. Section 11503 was originally enacted as Section 306 of Public L. No. 94-210, 90 Stat. 54 (1976); it was codified in 1978 as part of the revised Interstate Commerce Act at 49 U.S.C. Section 11503. In this brief, the provision will be referred to as Section 306.

The starting point for ad valorem taxation in the sister states is the valuation of all properties at fair market/true market value. The BN seeks a decisional rule which would permit a United States District Court, on mere allegations of overvaluation by a railroad, to second-guess the valuations set by the state taxing authority and substitute its estimate of value for that of the state tax administrator. Such an intrusion by the federal judiciary into matters of state ad valorem tax administration will wreak havoc in local units of government by withholding essential funds and will effectively establish dual standards of true market value—one applicable to local taxpayers and other interstate industries and the other applicable to selected carriers in interstate commerce.[2]

SUMMARY OF ARGUMENT

For fifteen years, Congress studied various proposals drafted by the Association of American Railroads to end alleged discriminatory taxation of interstate railroads. From the first proposal in the 1961 Doyle Report, the interstate railroads presented the members of Congress with proposed legislation, statistics, and expert testimony which supported their allegations that the railroads, when compared to other commercial and industrial taxpayers, were being taxed at higher rates.[3] As recounted to Congress, the railroads maintained that discrimination occurred in two ways: 1) the state, either by constitution, statute,

2. Throughout this nation, railroads and other public utilities are typically valued for ad valorem tax purposes by determining the system (or unit) value of the property, and allocating a portion of that system to each state in which it is situated. The BN's rule would permit the federal district courts to vary the valuation methodology used for railroads from the methodology used for all other public utilities.

3. The Doyle Report was concerned with the competitive relationship between different forms of transportation. Since many carriers' rights-of-way are maintained at the public's expense (i.e., highways), the Doyle Report recommended that the rights-of-way of railroads and pipelines be exempted from taxation. The Association of American Railroads, in the alternative, proposed a prototype Section 306. S. Rep. No. 445, 87th Cong., 1st Sess. (1961).

or administrative policy, classified railroads and other public utilities and applied a higher assessment ratio to their property than that applied to other commercial and industrial properties; or 2) the local county officials failed to annually value the properties within their assessment jurisdictions while the state officials, charged with the valuation of railroads and other public utilities, faithfully performed their duties. In the latter instance, the failure of the local units of government to reappraise in times of high inflation caused the effective rate of assessment of locally assessed property to be much lower than the effective rate of assessment of public utilities and railroads which were professionally appraised annually. Over and over the Association of American Railroads regaled Congress with its woes of unequal levels of assessment and the lack of equalization of rail transportation property with the property selected for comparison—other commercial and industrial property. A careful reading of the several thousand pages of legislative history of Section 306 conclusively demonstrates that the railroads, as proponents, never sought valuation relief.[4] Each time an opponent questioned the meaning of certain phrases or criticized the vague, overly broad language in the proposed bills, the railroads repeatedly assured Congress that valuation was not a problem and advised that the proposed legislation would not affect the internal workings of the various state tax administrators in determining valuations of rail transportation properties.

Since Congress was concerned with the right of each state to craft its own system of taxation, Congress sought the railroads' opinions on controversial issues. When various state tax administrators expressed great concern that the language of Section 306 might be construed to allow the federal courts to become involved in the valuation of railroad property, the railroads allayed these fears

4. The Bills, Hearings and Reports reviewed by the *Lennen* Court are set forth in Appendix A.

by responding that valuation was not an issue, by interpreting the suspect language as excluding overvaluation as a proscribed act, and by drafting a definition for true market value. Congress thereafter adopted the railroads' definition as its own. S. Rep. No. 1483, 90th Cong., 2d Sess. (1968).

In this case, the fears and concerns of the various states have been realized and have risen like a phoenix from the ashes; the BN has reversed its prior position and has reneged on the promises and assurances given to Congress. The BN now claims that the plain language of the statute does confer subject matter jurisdiction on the federal district courts to hear complaints of overvaluation. Since the legislative history is not supportive of its argument, the BN brushes it aside as irrelevant, or quotes passages from the legislative record out of context.

No careful examination of the legislative history supports the BN's assertion that Congress intended to vest the federal district courts with the power to value the nation's railroads for ad valorem tax purposes. Assuming, *arguendo*, that the BN prevails on its "plain language" argument, this Court must then resolve the more difficult issue of whether the congressional grant of jurisdiction to the federal courts to value property for state ad valorem tax purposes runs afoul of other provisions of the Constitution.

While the power of Congress under the Commerce Clause is plenary, it is not without restrictions; this power is subject to and coexistent with other constitutional limitations. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). When the construction of Section 306 urged by the railroads is examined, the constitutional infirmity of such an interpretation becomes evident. Application of principles of construction followed by this Court requires that Section 306 be construed in a manner which eliminates any doubt regarding its constitutionality. *United States v. Brandenburg*, 144 F.2d 656, 661 (3rd Cir. 1944). The legislative

history of Section 306 and the application of the general principles of statutory construction clearly demonstrate that Congress did not intend to provide federal jurisdiction to hear the railroads' complaints of improper valuation methodology.

Assuming, *arguendo*, that the BN convinces this Court that Section 306 should be broadly construed because Congress intended to provide great relief for the railroads, the *Lennen* threshold requirement of purposeful overvaluation must stand, because there is no evidence that Congress intended to change the burden of proof traditionally required by courts of equity hearing valuation complaints.

ARGUMENT

I. Congress, In Enacting Section 306, Did Not Intend For Federal Courts To Become Involved In The Valuation Of Railroads

The BN asserts that an examination of the legislative history of Section 306 is unnecessary because the statutory language is clear. (Pet. Br. at 22) Despite that claim, the BN devotes approximately one-half of its argument to a distorted analysis of the legislative history in a vain attempt to convince this Court that the exhaustive review of the fifteen year legislative history of Section 306 undertaken in *Lennen* was incorrect. The BN argues that the statements, interpretations and opinions offered to Congress by the attorneys-lobbyists of the Association of American Railroads are not relevant in construing the statutory language because these statements were merely opinions of individuals from the private sector.[5]

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5. James Ogden and Philip Lanier, in addition to making multiple appearances before Congress, acted as legal counsel for the Association of American Railroads by drafting legal memoranda on the meaning of various provisions in the proposed bills. It is important to note that Congress, on numerous occasions, adopted Messrs. Ogden and Lanier's views and opinions as its own.

(Pet. Br. at 25) The BN's position fulfills the prophecy of the various critics of Section 306 who faulted the vague language of the railroad-drafted legislation and predicted that the railroads might raise valuation as an issue.

Since the Association of American Railroads drafted the prototype of Section 306, the statements of that organization's representatives are particularly enlightening as to the meaning of certain phrases and the extent of relief sought. Congress adopted many of the Association's statements in its Reports; since these statements and assurances are admissions against its interest, the BN wishes to obscure these inconsistencies. Each time a responsible state official expressed concern that the proposed legislation might be construed to affect the state's valuations of rail transportation property, the railroads repeatedly advised Congress that valuation was not the problem for which they sought redress. Each time the valuation question arose, Congress adopted the explanations and assurances offered by the railroads and rejected the warnings of state tax officials.[6]

In 1964, James N. Ogden, Vice President and General Counsel of the Gulf, Mobile and Ohio Railroad Company, representing the Association of American Railroads, emphatically stated that the problem which confronted the railroads was *discriminatory equalization*, not valuation:

> *The principal problem* in the matter of railroad assessments *is not one of how to value a railroad.* In the hundred-year history of railroad taxation, the practice of valuing railroads for tax purposes has reached a substantial degree of refinement. Though not as simple as valuing a one-family dwelling, the method

6. Under the BN's version of the legislative history, Congress, after hearing the concerns of the various states, deliberately adopted legislation which established such fears and concerns as law. The legislative history is devoid of any evidence that Congress intended to penalize the states in such a fashion.

> is neither incomprehensible nor even overly complicated. And it should be remembered that no greater effort is required to assess a railroad fairly and reasonably than is required to assess one unfairly and unreasonably. *The real problem is to determine how much of the valuation that has been found should be assessed,* which, in turn, depends upon how much of the valuation of other property is assessed. *In other words, the problem is how to get the tax assessors in the several States to equalize the railroad's assessment with that of other property in the same taxing district.*
>
> True equalization requires that each parcel of property be assessed at a figure which is the same proportion of its full value as the assessment of every other parcel of property in the same taxing district is of its full value.
>
> Railroad assessments are not equalized fairly and reasonably in numerous instances. Many tax assessors simply cannot or will not equalize railroad assessments with the assessments of other property even though both kinds of property are subject to the same tax levy. *Hearings on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce,* 88th Cong., 2d Sess., at 18-19 (1964) (emphasis added).

The nation's railroads, speaking through Mr. Ogden, told Congress that because a substantial degree of refinement existed in the valuation procedure for railroads, *equalization* of assessment ratios and tax rates was the issue for which they sought relief. In 1967, Mr. Ogden, again, testified before Congress; this time, he addressed the valuation issue by noting that the phrase "true market value" had a well-defined meaning in the area of state ad valorem taxation. *Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce,* 90th Cong., 1st Sess., at 22 (1967). To explain the term "true market value" used in the proposed bill, Mr. Ogden supplied the following definition:

"True market value" is the goal generally sought by all tax assessors either as the assessment figure or as a starting point from which final assessments of less than "true market value" may be computed. In an authoritative treatise published by the National Association of Tax Administrators, the following statement appears:

> *"The statutes of the several States prescribing the value standard for tax purposes use such terms as 'fair market value,' 'fair cash value,' 'full market value,' and the like. All of these terms are synonymous*: they mean nothing more and nothing less than what we mean in this report by the term 'market value' or the word 'value' without a qualifying adjective."

These have been judicially defined in numerous cases. For instance, I call your attention to *New York Bay R. Co. v. Kelly*, 22 N.J. Misc. 204, 37 A. 2d 624, 628 (1944); *Fort Worth & D.N. Ry. Co. v. Sugg* (Tex. Civ. App.), 68 S.W. 2d 570, 572 (1934); and *Guyandotte Valley R. Co. v. Buskirk*, 57 W. Va. 417, 50 S.E. 521, 526 (1905).

Of course, the proportion of "true market value" at which assessments are finally fixed varies among the several States. In some States the law requires assessment at "true market value," in others at 60 percent thereof, in others at 35 percent, et cetera.

Railroad property in most of the States is valued and assessed as a unit; that is, the whole system as it exists in 8, 10, or 15 States is valued; this value is distributed among the several States on the basis of recognized allocation factors; and then, in turn, the value in a particular State is apportioned among the several taxing districts in that State on the basis of mileage. In other words, when railroads are assessed as a unit the total value is first determined and then apportioned: the total assessment is not determined by adding the assessed value of individual items that make up the railroad plant.

As to the few States in which railroad property is locally assessed, I have no specific information concerning the assessment methods but I suppose it would be natural for the assessors to compare adjoining properties.

Let me emphasize that *S. 927 does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves.* It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. *It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.* This standard is 'true market value' (also the generally accepted standard for assessment purposes) and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed. *Id.*, at 29 (emphasis added).

Although the BN attempts to minimize the importance of Mr. Ogden's testimony by referring to him as merely an individual from the private sector, Congress accorded Mr. Ogden's explanation of "true market value" much greater weight; his definitional statement was subsequently adopted by the Senate Committee on Commerce in its entirety as "Appendix B" in its 1968 *Report on Discriminatory State Taxation of Interstate Carriers*:

> In order to avoid any question as to the meaning of the phrase "true market value" as used in S. 927, the committee accepts the definition of this phrase as set forth in appendix B attached to this report. *The committee intends by the phrase "true market value" the meaning set forth in appendix B.* S. Rep. No. 1483, 90th Cong., 2d Sess., at 10 (1968) (emphasis added).

After Congress defined "true market value" in its 1968 Report, that phrase remained unchanged in all subsequent Section 306-type bills. Congress clearly expressed its intention when it stated that "true market value" is not a standard for determining value and recognized

that the several states used various terms for "true market value". By adopting the Association of American Railroads' statement, Congress intended that "true market value" used in Section 306 would not be a standard for determining value and clearly stated that the true market value was a standard for comparison of assessments. Like Congress, the railroads, from 1967 until passage of Section 306 in 1976, were steadfast in their opinion that Section 306 did not provide a means for redetermining value.

During the July 30, 1969, *Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce,* 91st Cong., 1st Sess., the question of whether the federal courts would be empowered to redetermine the valuation of the railroads' property by substituting the court's valuation for that of the state once again arose. This time, Philip M. Lanier, on behalf of the Association of American Railroads, responded to a question from Senator Hansen on how railroads were valued in his home state of Wyoming:

> SENATOR HANSEN: Is this same formula—this same three-factor formula in use for the purpose of this study throughout the country, or is this only the way it is done in Wyoming?
>
> MR. LANIER: The formula varies from State to State and we are not dealing with the valuation question. This is not our problem. We speak *only* of the equalization of the tax rate. *Id.*, at 39.

The Senate Committee on Commerce in its *Report on Discriminatory State Taxation of Interstate Carriers* reiterated the view set forth in its earlier report—that S. 2289, like S. 927, was not intended as a standard for determining value. *See* S. Rep. No. 91-630, 91st Cong., 1st Sess., at 10 and 25-26 (1969).

In the 1970 *Hearings on H.R. 16245 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., the issue of valuation was put to its annual

"final" rest; once again, Philip M. Lanier explained that the bill did not give the federal courts the right to redetermine valuation. Lanier reiterated that the bill only required that the values, both assessed and true market set by the taxing officials (both local and state), be compared:

> MR. LANIER: On the valuation—this bill would not deal with valuation being standard. *The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation.*
>
> The short answer, if I may give it this way, and I think it will be clear, is that for valuation purposes different kinds of property put to different uses do require different methods of valuation. And the method of valuation applied to a railroad is quite different from that which is applied to a residence, a farm, factory, whatever it may be.
>
> And that is appropriate because it is the way to get at the real value. *There is nothing in this legislation—and we have no brief here to alter that—it is only in the area of equalization of the computed value that this legislation speaks.* That is where our problem is.
>
> MR. ADAMS: On page 2 of the bill it says, "The assessment"—which is what the tax collector comes in on—"for the purposes of a property tax"—and that is all I am talking about here now—"owned or used by a common carrier at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all other such property."
>
> *That appears to me that you are taking into account both valuation and assessment.*
>
> MR. LANIER: I think I can answer it this way.
>
> *Without regard to this legislation, assuming it is enacted, without regard to it the assessing authority for the railroads put a value*—a fair market value, true market value, the words mean the same—*on that railroad property and the local assessor in the towns*

you refer to puts a true market value on the residences. After that is done, this bill would come into play. *Id.*, at 138-39 (1970) (emphasis added).

The question of whether overvaluation was an issue with which Congress was concerned in enacting Section 306 was finally laid to rest in the *Report on S. 2718 of the Comm. of Conference,* Rep. No. 94-595, 94th Cong., 2d Sess. (1976). The Conference Committee met to resolve the differences between the House and Senate versions of what is now Section 306. The Conference Committee Report indicates that the House amended S. 2718 to include overvaluation among the prohibited tax practices and further provided methods by which true market value could be established. *Id.*, at 166. The Senate version of the bill did not include "overvaluation" as one of the prohibited acts and therefore did not outline any methods by which true market value could be established. *Id.*, at 165. When the Conference Committee reconciled the differences in the two versions by adopting a substitute bill which followed the Senate version, overvaluation as a proscribed act under Section 306 was deleted. *Id.*, at 166. Congress, in 1976, refused to adopt a bill which included overvaluation as a proscribed act under Section 306; the BN is asking this Court to grant that which Congress denied. This Court cannot rewrite this legislation to give the railroads that which Congress specifically withheld.

In every major hearing on the predecessors to Section 306, the railroads were asked whether the proposed legislation would allow a federal judge to redetermine the value of a railroad. On each occasion, the Association of American Railroads, through their attorneys-lobbyists, replied in the negative. Congress took the railroads' assurances at face value and adopted the railroads' statement that the statute "is not a standard for determining value" in its Reports.[7] Unlike other portions of the Section 306, the term

7. *See,* S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969).

"true market value" never changed throughout the fifteen years of congressional consideration. The legislative history reveals clearly that neither Congress nor the railroads intended to turn the federal judiciary into property appraisers.[8]

Had Congress intended to pre-empt the rights of states in valuation matters and establish a precise federal standard for determining true market value, it would have included "true market value" in its definition section, would have specified overvaluation as a proscribed act, and would have prescribed a valuation methodology to be used by the courts. The absence of such definition, directive, and methodology in Section 306 reflects Congress' intention to respect the true market value determinations of state tax administrators. Neither the legislative history nor the language of Section 306 evidences an intent by Congress that valuation should be redetermined by courts hearing Section 306 actions. This Court cannot second-guess the wisdom of Congress to give to the railroads that which Congress withheld.

II. The Statutory Construction Urged By The BN Would Render Section 306 Unconstitutional

The BN urges this Court to broadly construe the provisions of Section 306. The BN's brief is silent as to whether its proposed statutory construction withstands constitutional challenge. Congress was advised of and well knew the limitations of its power. For this reason, Con-

8. While Congress was repeatedly advised that state officials were valuing Railroad property at true market value, the railroads paraded witness after witness before Congress to testify that locally assessed real estate and personal property were valued infrequently or undervalued. Typical of such testimony was that of Rolf Weil who told Congress that while local assessors often undervalued or failed to revalue in times of high inflation, the states' highly qualified staff annually valued the railroads' property at full value. Dr. Weil advocated the use of ratio studies to determine the true market value of the locally appraised property. *Hearings on S. 927 before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce,* 90th Cong., 1st Sess., at 68-9 (1967).

gress repeatedly directed that the statute should be construed by the courts to avoid any constitutional infirmity. *See, S. Rep. No. 1483,* 90th Cong., 2d Sess., at 12 (1968).

The relief requested in the instant appeal is that the trial court should decide whether the BN's rail transportation property has been valued by the State of Oklahoma in excess of its "true market value." The first step in reaching such a determination necessarily requires that the federal district court revalue the property in order to determine the BN's "true market value." To decide whether the interpretation urged by the BN is constitutional, this Court must decide the following issues:

(1) Whether federal courts possess the inherent power to value railroad property for state ad valorem tax purposes absent specific statutory authority;[9] and

(2) Whether Congress could legislatively grant jurisdiction to federal courts to perform the nonjudicial function of valuation for state ad valorem tax purposes.

Application of constitutional principles requires both of these questions be answered in the negative.

A. Federal Courts Do Not Possess The Inherent Power To Value Property For State Ad Valorem Purposes

The BN, in asserting that the *Lennen* decision will thwart the purposes of Section 306, has implicitly argued that, but for the jurisdictional bar of the Tax Injunction Act, 28 U.S.C. Section 1341 (hereinafter "Section 1341"), federal courts inherently possess the power to value property for state ad valorem tax purposes. The BN reasons that since Section 306 lifts the Section 1341 jurisdictional bar, the federal courts have the power to revalue, even though Section 306 does not contain a specific grant of such power. No pre-Section 1341 cases have been cited which support such an assertion. The absence of authority is due to the fact that the pre-Section 1341 case law favors the Oklahoma Tax Commission.

9. While space does not permit a detailed discussion of the ability and resources of a court to hear valuation cases, it should be noted that in *Burlington N. R.R. v. Bair,* 584 F. Supp. 1229 (S.D. Ia. 1984), *aff'd in part; rev'd in part,* 766 F.2d 1222 (8th Cir. 1985), the court admitted that this type of litigation is complex. The Kansas 4-R litigation demonstrates the burden placed upon the federal courts. It took four years to resolve the various issues; during this period, the railroads in Kansas obtained injunctive relief and withheld $24,000,000.00 from Kansas counties. At the conclusion of the litigation, these monies were finally restored to the counties.

As early as 1874, this Court declined an invitation to involve itself in the valuation of property for state ad valorem tax purposes. *Heine v. Board of Levee Commissioners,* 86 U.S. (19 Wall.) 655 (1874). In *Heine,* certain bond holders brought an action seeking an order of the district court requiring the commissioners to value and collect taxes on the property within their district and pay the interest and principal due on the bonds. In the alternative, the plaintiffs asked that the court perform such acts. Justice Miller, speaking for this Court, declared that the relief requested would constitute a federal usurpation of the state's legislative power:

> The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. *It is not only not one of the incident powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state government.* It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which

no wisdom can foresee. 86 U.S. (19 Wall.) at 660-61 (emphasis added).

Under our system of government, the power of taxation belongs to the legislative branch of government. The legislative branch may exercise its power of taxation by establishing administrative officers who are charged with the responsibility of administering the tax imposed. The separation of powers doctrine prohibits the judiciary from interfering with or substituting its judgment for that of these administrative officers.

The BN seeks, under the guise of Section 306, to retry an issue settled more than a century ago. In *Taylor v. Secor, "State Railroad Tax Cases,"* 92 U.S. 575 (1876), the railroads brought suit in federal court alleging that an Illinois statute prescribing a valuation methodology for railroads produced excessive valuations and requested the excessive valuation be enjoined. This Court refused to grant the relief requested, citing a lack of constitutional authority:

> One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that *it has no power* to apportion the tax or *to make a new assessment*, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the Constitutions of all the States, and by the theory of our English origin, is exclusively legislative. *Heine v. Levee Comrs.*, 19 Wall. 660, 22 L. ed. 226. *Id.*, at 614-15 (emphasis added).

Following the century-old rationale of this Court in the above decisions, lower federal courts have acknowledged that the doctrine of separation of powers severely restricts their ability to interfere with matters of state assessment and taxation. In *Helmsley v. City of Detroit, Michigan*, 320 F.2d 476 (6th Cir. 1963), the Sixth Circuit affirmed the district court's dismissal of a complaint seeking a declaratory judgment that the assessment and ad valorem taxes on certain real estate violated the due process and equal protection clauses of the Fourteenth Amendment. In so holding, the Sixth Circuit stated quite emphatically:

> Taxation is a legislative function and not a judicial function. It is proper therefore that courts should not substitute their judgment for that of the taxing authorities and should not interfere with them except in cases of constructive fraud.
>
> . . .
>
> We do not think it is the function of any trial court, having jurisdiction to hear plaintiff's complaint, to specifically fix the amount of the assessment on his property. *Id.*, at 480-81.

B. Congress Lacks The Power To Grant Jurisdiction To The Federal Courts To Perform The Nonjudicial Function Of Valuation

Congress was aware that if Section 306 was broadly interpreted, the statute could be rendered unconstitutional as an unauthorized delegation of legislative power. The Attorney General of the United States repeatedly cautioned Congress regarding the potential constitutional infirmities by quoting *Moses Lake Homes, Inc. v. Grant Co.*, 365 U.S. 744 (1961): "Federal courts may not assess or levy taxes".[10] Two Vanderbilt law professors, Paul J. Hartman and Paul H. Sanders, retained by the Association of American Railroads, echoed the opinion of the Attorney General on the prohibition set forth in *Moses Lake*. Professors Hartman and Sanders opined that *Moses Lake* was "good law" and assured Congress that the proposed statute would be interpreted by the courts to avoid any constitutional infirmity:

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10. *See, Hearings on H.R. 4972 Before The House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., at 3-4 (1966) and Rep. No. 1483, 90th Cong., 2d Sess., at 16 (1968), for examples of the Attorney General's letters.

The proposed statute does not require or direct that the Federal judge perform the tax assessment or tax levying function. *Moses Lake* is eminently correct, of course, in saying that federal courts do not assess or levy state taxes as such.

. . .

The proposed statute provides injunctive relief against discrimination and unquestionably such a remedy should be "fashioned in the light of well-known principles of equity."

. . .

In the last place, the *Moses Lake* decision does not indicate any constitutional infirmity in the provisions for remedy in the proposed statute because *it is obvious that this statute can and should be construed so as to avoid any charge that a nonjudicial function is required to be performed.*

Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., at 53 (1966) (emphasis added).

After hearing the Vanderbilt professors, Congress instructed that Section 306 should be construed to avoid any charge that a nonjudicial function was imposed on the courts. *See, S. Rep. No. 1483*, 90th Cong., 2d Sess., at 12 (1968).

It is well established that the determination of value for state ad valorem purposes is a non-judicial function belonging to the legislative branch of government.[11] *Heine.*

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11. Kansas, like most other states, adheres to the separation of powers doctrine; for this reason, Kansas courts have long observed the principles articulated by this Court in *Heine* and the *State Railroad Tax* cases. An example of the Kansas Supreme Court's reasoning is well illustrated in *Mobil Oil Corporation v. McHenry*, 200 Kan. 211, 436 P. 2d 982 (1968):

> It has been held from an early date that matters of assessment and taxation are administrative in character and not judicial. In *Symns v. Graves*, (1902), 65 Kan. 628, 70 Pac. 591, it was said:
>
> > "*. . . Matters of assessment and taxation are administrative in their character and not judicial, and an interference by judges* who are not elected for that purpose *with the discharge of their duties by those officers who are invested with the sole authority to make and estimate value is unwarranted by the law.* The district court could not substitute its judgment for that of the board of equalization, and *this court cannot impose its notion of value on either.* These are fundamental principles in the law of taxation and cannot be waived aside to meet the exigencies of any particular case. . . . (p. 636)" *Id.*, at 227 (emphasis added).

Similarly, the Tenth Circuit, in a case tried prior to the enactment of 28 U.S.C. Section 1341, *Pleasant v. Missouri-Kansas-Texas R.R.*, 66 F.2d 842 (10th Cir. 1933), *cert. denied*, 291 U.S. 659 (1934), recognized the separation of powers doctrine which it observed with deference:

> If the assessment is higher than it should be, as the master and the trial court found, it is the result of a mistake which must be corrected, if at all, by the Commission which made it; *the courts cannot try anew all the assessments in the state.* *Id.*, at 850 (emphasis added).

The legislative branch may exercise its power of taxation by establishing administrative agencies and empowering officials to operate the same. The separation of powers doctrine imposes restrictions on the branches of government: the legislative branch is prohibited from delegating its power of taxation to the judiciary, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), *Western Union Tele. Co. v. Myatt*, 98 F. 335 (1899); the judicial branch is prohibited from interfering with or substituting its judgment for that of state officials legislatively authorized to administer the state system of taxation. *Moses Lake Homes; State Railroad Tax Cases.* The relief sought by the BN would require that the federal court perform a nonjudicial function of valuing the property anew and substituting its notion of true market value for that of the state tax official; this construction does not withstand constitutional analysis.

III. The 10th Circuit's Threshold Requirement Of Purposeful Overvaluation With Discriminatory Intent Is Supported By Traditional Equitable Principles

When the Tenth Circuit rendered its decision in *Lennen*, it had analyzed the legislative history of Section 306, reviewed the recent state tax decisions of this Court,

and examined a long line of equity cases decided prior to the enactment of the Tax Injunction Act. The *Lennen* court did not decide the overvaluation issue in a vacuum; the Kansas 4-R equalization case was pending before that court. Contrary to the assertion of the BN and the Solicitor General, the Tenth Circuit did not invent the threshold requirement of purposeful overvaluation with discriminatory intent, but relied upon well established equitable principles in determining which actions were cognizable under its general equity powers. In order to appreciate the foundation for the Tenth Circuit's rationale, a procedural review of the *Lennen* litigation provides insight.

In 1980, eleven railroads sued the Department of Revenue and then Secretary of Revenue Michael Lennen, alleging that Kansas had violated Section 306 by assessing rail transportation property at a higher ratio of true market value than other commercial and industrial property was assessed. The eleven railroads admitted that Kansas had valued their rail transportation property at its true market value; their complaint was that, due to infrequent reappraisal by the county assessors during a period of high inflation, locally assessed real estate was valued at less than its true market value. The railroads sought an injunction prohibiting Kansas from applying a higher rate of assessment to their true market value than the rate of assessment applied to the true market value of locally assessed property as demonstrated by a sales-assessment ratio study.[12] Following a three and one-half week trial in 1982, the District Court enjoined the State from collecting 60% of the taxes levied. *Atchison, T. &*

12. The Railroads, in order to convince the district court that their property should be equalized with locally assessed real estate only, argued that an examination of the legislative history was essential and would establish that Congress intended, by its reference to ratio studies, to make the comparison property for equalization commercial and industrial real estate only, even though the statutory definition in Section 306 stated otherwise.

S.F. Ry. v. Lennen, 552 F. Supp. 1031 (D. Kan. 1982) (hereinafter "equalization case"). The State and County Defendants appealed to the Tenth Circuit.

Within six months of the decision in the 1980 equalization case, the railroads commenced their action for the 1982 tax year. In the 1982 case, six of the eleven railroads alleged, for the first time, that Kansas had valued their rail transportation property at a value which exceeded true market value.[13]

The District Court, in November 1982, heard the valuation claim of the six railroads (hereinafter "BN Railroads"). The BN Railroads relied upon a consultant for their estimates of value; the State, after objecting to the court's jurisdiction, called the Director of Property Valuation and two appraisers with the Public Service Bureau of the Department of Revenue.

Both sides agreed that the proper method for valuing a railroad was to determine its system or unit value and then allocate a portion of that system value to each state in which it had property; both parties utilized the same general methodology to arrive at their estimates of value. The BN Railroads' consultant quibbled with some of the factors used by Kansas in doing its calculations but acknowledged that, as he had testified in the 1980 equalization case, Kansas followed a particularly consistent approach to value. He also admitted that he had opined in the 1980 case that the values used in Kansas were reasonable.

After hearing detailed testimony regarding the Kansas valuation methodology, the District Court denied the re-

13. The six Railroads challenging the State's determination of value were the Burlington Northern Railroad, the Missouri Pacific Railroad, the Kansas City Southern Railway, the Kansas and Missouri Railway and Terminal Company, the Union Pacific Railroad and the Missouri-Kansas-Texas Railroad. Five railroads admitted that the values determined by the State were their true market values: The Atchison, Topeka and Santa Fe Railway, Chicago and Northwestern Transportation Company, Chicago, Rock Island and Pacific Railroad, Kansas City Terminal Railway and the St. Louis Southwestern Railway.

quest for a preliminary injunction, finding that the BN Railroads had failed to demonstrate reasonable cause to believe that Kansas had overvalued their property in 1982.[14] The District Court also held that Congress, in enacting Section 306, did not generally intend for federal courts to become involved in the valuation process. *Burlington N. R.R. v. Lennen*, 573 F. Supp. 1155 (D. Kan. 1982). The BN Railroads appealed to the Tenth Circuit Court of Appeals from the order denying the preliminary injunction.

When the Tenth Circuit heard the valuation appeal on May 19, 1983, it had, in addition to the Record below, the briefs on the 1980 equalization case as well as the Joint Legislative History Appendix as references.[15] The same panel heard both the Kansas valuation and equalization appeals before issuing its decisions; that panel understood all of the inconsistencies in the Railroads' arguments on "plain language" and the differences between valuation and equalization relief.[16] Unlike the Eighth Cir-

14. The court heard testimony that all railroads in 1982 *were valued in exactly the same manner*. The court also was advised that from 1971 to 1982, no actions were commenced before the Kansas Board of Tax Appeals or a Kansas Court by railroads seeking valuation relief; other public utilities, valued by the same methodology during the same period, had appealed their determinations of value to both the Board of Tax Appeals and the courts and had received relief. *See*, Statement of Barry N. Roth, Vice President, The Williams Company, in opposition to H.R. 2092, a Tax Discrimination Bill for Natural Gas Pipelines. *Hearing on H.R. 2092 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985). The Tax Discrimination Bill for Natural Gas Pipelines was not enacted when considered by the 99th Congress.

15. In order to assist the Tenth Circuit, the State and County Defendants jointly filed a two volume Appendix which contained complete copies of all of the bills, hearings and reports on Section 306. The Joint Appendix contained several thousand pages and weighed approximately five pounds.

16. Petitioner and the Solicitor General express confusion about the differences between actions seeking relief from overvaluation and equalization. (Pet. Br. at p. 11 f.n. 18; U.S. Br. at 5) Had Petitioner, like the 10th Circuit, read the legislative history of Section 306, it would not be puzzled because equalization relief was defined and discussed in detail.

cuit in *Burlington N. R.R. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), and the Ninth Circuit in *Atchison, T. & S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), the Tenth Circuit in *Lennen* had a unique opportunity to examine in detail the differences between valuation and equalization actions.

In the Kansas equalization case, *Atchison, T. & S.F. Ry. v. Lennen*, 552 F. Supp. 1031 (D. Kan. 1982), the railroads argued that Section 306 was ambiguous and could only be correctly construed by examining the legislative history; the Tenth Circuit was inundated with references to the legislative history to assist in the construction of various phrases in the statute. Both the District Court and the Tenth Circuit found that an analysis of the legislative history was essential to provide guidance as to the correct manner for achieving equalization of assessment ratios. The Tenth Circuit resolved the following equalization issues which were unanswered by the "plain language of the statute":

1. Whether the sales-assessment ratio study was the sole means for proving the true market value of all other commercial and industrial property;

2. Whether the reference to sales-assessment ratio studies reflected Congress' intention to make commercial and industrial real estate the comparison property since personal property sales-assessment ratio studies were not commonly conducted;

3. Whether centrally assessed public utilities were commercial and industrial property for equalization purposes; and

4. Whether commercial and industrial personal property should be included in determining the level of assessment for the comparison property—all other commercial and industrial property. *See, Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495 (10th Cir. 1984).

The Tenth Circuit's concern with the absence of a legislatively mandated means for determining the true market vlaue for railroads in *Lennen* resulted from the examination required in the equalization case of the volumin-

ous references in the legislative history to the sales-assessment ratio study—the means endorsed by Congress for proving the true market value of other commercial and industrial property. Section 306(2)(e).[17] Congress knew that valuations and appraisals are subjective determinations; the omission of an objective standard for proving the true market value for railroads cannot be considered accidental when an objective standard—the sales-assessment ratio study—was mandated for proving the true market value of commercial and industrial property. The Tenth Circuit, following its in-depth review of the legislative history, correctly concluded that the omission of such an objective means of proof was deliberate, because Congress did not intend for district courts to sit as state tax appraisers for railroad properties.

While the *Lennen* decision rested, in part, upon the repeated assurances of railroad attorneys-lobbyists that valuation was not a problem, the Tenth Circuit was also mindful that Congress in Section 306 attempted to balance the interest of the railroads in property tax equalization with the interest of the states in retaining their rights as sovereign states.[18] The enlargement of the court's ju-

17. The railroads were unconcerned about valuation. In promoting Section 306, the railroads hired numerous experts in the area of tax administration to educate Congress about equalization. The experts wrote memoranda explaining equalization in detail and discussed how to perform a sales-assessment ratio study on locally assessed property in order to determine its true market value. There was no similar presentation by appraisers retained by the railroads; the railroads never discussed the proper manner or methodology for valuing a railroad with Congress.

18. The issue of states rights received major debate during the fifteen years Section 306 was considered by Congress. In 1964, the Advisory Commission on Intergovernmental Relations advised:

> While considerations of interstate commerce are important, they occupy a subordinate position to the requirement of this Federal system of government that, subject only to the limitations of the Constitution, the States, as the Federal Government, are free to shape their own and their political sub-divisions' tax systems. *Hearing on H.R. 736 of the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess., at 6 (1964).*

risdiction under Section 306 sought by the BN Railroads conflicted with the congressional concern for states' rights. The Tenth Circuit's conclusion that "the valuation relief sought by the railroads is not provided by Section 306" is supported by the language of the statute and the legislative history.

However, once the Tenth Circuit announced its decision on statutory construction, it had to address a factual issue peculiar to the *Lennen* litigation—whether the Kansas officials, following the decision in the 1980 equalization case deliberately raised the 1982 valuations of the BN Railroads in order to recoup a portion of the 1980 taxes enjoined. The District Court in *Lennen* was justifiably concerned that the state officials had retaliated against the railroads. After a three day trial, the District Court was satisfied that Kansas had not violated its previously issued injunction and that the railroads' valuations had increased

Congress was concerned that, under the guise of the Commerce Clause, they were being asked to regulate and restructure the legislatively devised tax structures of the various states. From such concerns came the direction of the various Congressional Committees that the "bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers." S. Rep. No. 1483, at 14 (1968). The concern of Congress with the possible intrusion upon states rights did not end in 1968; states rights was a reoccurring theme throughout the fifteen year history with Congress repeatedly stating in its Reports that the measure granted no favored status to transportation property nor a windfall to carriers. To guarantee that no favored status was afforded, Congress advised:

> . . . the mere grant of jurisdiction to Federal courts to consider issues under this measure does not mean that the Federal courts will enjoin all State taxation of property that the carriers allege to be discriminatory . . . the carrier would have to make the usual showing to obtain injunctive relief. Since the measure in essence grants equity jurisdiction to the courts, it is expected that the courts will balance the adverse impact on the community of any relief granted against the benefits to be derived by the carrier from such relief. The courts are capable of fashioning remedies that are not burdensome to the communities involved. S. Rep. No. 92-1085, 92d Cong., 2d Sess., at 8 (1972).

due to mergers and improved performance reflected in the market and income approaches to value. As a warning against future retaliation, the District Court held jurisdiction would be entertained if the railroads could make a "strong showing that state authorities had deliberately overvalued their property in retaliation for previously obtained equalization relief." The Tenth Circuit, in addressing the same factual issue, acknowledged the narrow equity power found by the District Court but broadened its scope to provide for an action for intentional, purposeful overvaluation whether or not there had been previous litigation between the parties.

The Tenth Circuit knew, from its thorough examination of the legislative history, that Congress intended the measure to grant equity jurisdiction to the courts. *S. Rep. No. 92-1085*, 92d Cong., 2d Sess., at 8 (1972). Congress was emphatic that Section 306 should *not* be construed to provide relief for all actions which were alleged to be discriminatory:

> Enactment of this section will not necessarily mean that the Federal Courts will enjoin all state taxation of rail property which are the subject of complaint. The railroads will still have the usual burden of demonstrating that discrimination exists. They will also have to make the additional showing that they are entitled to injunctive relief. Railroad Revitalization and Regulatory Reform Act of 1975, 94th Cong., 1st Sess., Rep. No. 93-725, at 77-8 (1975).

The Tenth Circuit was aware that, as a matter of general principle, courts of equity must consider the interests of both the plaintiff and the defendant. *Wilson v. Shaw*, 204 U.S. 24 (1906). The *Lennen* court was mindful of this Court's recent decisions in *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) and *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981) which discussed the interrelationship of the principles of equitable restraint, comity, and Tax Injunction Act, 28 U.S.C. Section 1341. In *McNary*, this Court held that the principle of

comity bars taxpayers from asserting 42 U.S.C. Section 1983 actions challenging the validity of state tax systems in federal courts. In *Rosewell*, this Court recognized that the pre-1937 federal equity treatment of challenges to state taxes followed the long standing rule of federal equity to keep out of state tax matters as long as a "plain, adequate and complete remedy" could be had at law. *Id.*, 450 U.S. at 525.

Cognizant that the most recent determinations of this Court instruct that federal litigation which would intrude upon and disrupt state tax systems should not be allowed absent extraordinary circumstances, the Tenth Circuit reached back to a long line of equity cases decided prior to the enactment of 28 U.S.C. Section 1341. These cases, which held that equity will not interfere absent proof of circumstances indicating actual or constructive fraud on the part of the taxing authorities or something evincing an intention to discriminate against a particular taxpayer, provided the prerequisite for maintaining an action seeking valuation relief under Section 306. In *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102 (1934), this Court reversed a Tenth Circuit decision in favor of the railroad. In *Rowley*, the railroad alleged that the State had systematically and intentionally discriminated against the railroad by overvaluing its property. In holding that the railroad was not entitled to an injunction, this Court, citing a myriad of cases, reiterated the then well established principle that, absent proof of circumstances indicating fraud, equity will not grant relief:

> There is nothing in this record to suggest any lack of good faith on the part of the board. *Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose,* to disregard the fundamental principle of uniformity. *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 62 L. ed. 1154, 38 S. Ct. 495;

> *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 67 L. ed. 340, 43 S. Ct. 190, 28 A.L.R. 979; *Chicago G. W.R. Co. v. Kendall*, 266 U.S. 94, 69 L ed. 183, 45 S. Ct. 55; *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 245, 76 L. ed. 265, 271, 52 S. Ct. 133; *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28, 76 L. ed. 146, 149, 52 S. Ct. 48. *Id.*, at 111 (emphasis added).

The requirement of purposeful overvaluation with discriminatory intent was the controlling rule for courts of equity prior to the enactment of the Tax Injunction Act, 28 U.S.C. Section 1341. *See also, Chicago, Great Western Ry. v. Kendall*, 266 U.S. 94 (1924) where Justice Taft, in affirming a denial of an injunction in a suit alleging overvaluation of railroad property, stated:

> It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. *There must be clear and affirmative showing that the difference is an intentional discrimination, and one adopted as a practice.* *Id.*, at 98-9 (emphasis added).

and *Chicago, Burlington and Quincy Ry. v. Babcock*, 204 U.S. 585 (1907) where Justice Holmes, after reiterating the general principle of non-interference by a court of equity in the absence of fraud or intentional overvaluation, commented on the railroad's failure to meet its burden of proof:

> . . . it is enough to say that *no scheme or agreement* on the part of the county assessors, who taxed the other property, *was shown*, or *on the part of the board of equalization and assessment* . . . *Id.*, at 597 (emphasis added).

Although the BN and the Solicitor General argue that the threshold requirement of purposeful overvaluation with discriminatory intent is nothing more than judicial legislation, the prerequisite in *Lennen* was not established by

the Tenth Circuit but was a tried and true equitable principle rooted in the sound legal thought of this Court.[19] Had Congress intended to remove the jurisdictional threshold which this Court has long recognized as a prerequisite for a court of equity to entertain an action alleging overvaluation, it would have redefined the equitable jurisdiction by enacting a specific directive. The mere lifting of the jurisdictional bar of 28 U.S.C. Section 1341 in Section 306 does not change or eliminate the long standing proof required by a court of equity for maintenance of a suit to enjoin taxes on allegations of overvaluation. The jurisdictional threshold requirement of purposeful overvaluation with discriminatory intent enunciated in *Lennen* recognizes and adheres to the proof required by this Court in actions seeking equitable relief in matters of state taxation.

The BN ignores more than a century of precedent in arguing it may maintain an action seeking injunctive relief for alleged overvaluation based on nothing more than the meretricious opinions of true market value espoused by its appraisers. Nothing in Section 306 or its legislative history supports such an abrupt departure from and enlargement of the traditional principles governing the jurisdiction of a court of equity. The Tenth Circuit in *Lennen* applied well-founded principles of equity when it held that overvaluation actions were not cognizable under Section 306 absent a showing of purposeful over-

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19. Although the Solicitor General suggests that the *Lennen* requirement frustrates the purpose of Section 306, the Solicitor General agrees that not every allegation of overvaluation is cognizable in federal court. (U.S. Br. at 24-5) The Solicitor General in its *Lennen* amicus brief claimed that Section 306 applied to overvaluations resulting from an assessment rule or methodology which *systematically* produced excessive values and acknowledged the "outcome under the court of appeals' test and under our proposed standard will be the same." (U.S. Lennen Br. at 14-15, f.n. 7) Since the test articulated by the Tenth Circuit is rooted in historical precedents, this Court should not be swayed by the Solicitor General's uncertain threshold requirement.

valuation with discriminatory intent. This Court must apply those same equitable principles and affirm the decision below.

CONCLUSION

Section 306 of the 4-R Act was enacted to correct discriminatory tax treatment of railroads. Its purpose was not to absolve railroads from ad valorem taxation altogether. The BN has argued that, unless the *Lennen* rule is reversed, the objectives of the 4-R Act will be negated. Neither the legislative history nor the statutory language of Section 306 supports the BN's claim that Congress intended to grant subject matter jurisdiction to the federal district courts to hear their annual woes of alleged overvaluation for ad valorem tax purposes. The statutory construction sought by the BN raises serious doubts regarding Section 306's constitutionality and contravenes a specific directive from Congress that the act be interpreted in a manner to avoid a charge that a nonjudicial function (i.e. valuation) is required to be performed. The BN attacks the *Lennen* jurisdiction threshold as being judicial legislation based upon an arrogant premise that a court of equity under Section 306 must enjoin any act which it claims results in discriminatory taxation.

This Court must refuse the BN's invitation to sit as a super-legislature and enlarge the relief available under Section 306 to include suits based on mere allegations of overvaluation.

Respectfully submitted,

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APPENDIX A

The following list of references are the Bills, Hearings and Reports of the House and Senate on all of the Section 306-type legislation. The District Court for the District of Kansas, *Burlington N. R.R. v. Lennen*, 573 F. Supp. 1155 (D. Kan. 1982), and the Tenth Circuit reviewed all of the Bills, Hearings, and Reports in reaching their decisions:

H.R. 7497, 87th Cong., 1st Sess. (1961); H.R. 736, 88th Cong., 1st Sess. (1963); H.R. 4972, 89th Cong., 1st Sess. (1965) (together with twelve other identical bills); S. 2988, 89th Cong., 2d Sess. (1966); S. 927, 90th Cong., 1st Sess. (1967); H.R. 1480, 90th Cong., 1st Sess. (1967); S. 2289, 91st Cong., 1st Sess. (1969); H.R. 16245, 91st Cong., 2d Sess. (1970); S. 2841, 92nd Cong., 1st Sess. (1971); S. 3945, 92nd Cong., 2d Sess. (1972); S. 1891, 93rd Cong., 1st Sess. (1973); H.R. 10979, 94th Cong., 1st Sess. (1975); S. 2718, 94th Cong., 1st Sess. (1975).

Hearings and Reports on the above bills are found at the following references:

Hearing on H.R. 736 and H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964);

Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess. (1966);

Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce 90th Cong., 1st Sess. (1967);

Report of Hearings S. 927 Before Senate Comm. on Commerce, 90th Cong., 2d Sess., Rep. No. 1483, (1968);

Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 91st Cong., 1st Sess. (1969);

Report of Hearings on S. 2289 Before Senate Comm. on Commerce, 91st Cong., 1st Sess., Rep. No. 91-630 (1969);

Hearing on H.R. 16245 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970);

Hearings on S. 2363 and S. 1092 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 92nd Cong., 1st Sess., Surface Transportation Act of 1971 (November 4, 5, 16, December 8, 1971 and January 26, 1972);

Report on 3945 of the Senate Comm. on Commerce, 92nd Cong., 2d Sess., Rep. No. 92-1085 (1972);

Report on S. 2718 of the Comm. of Conference, 94th Cong., 2d Sess., Rep. No. 94-595 (1976).